A

See Hua Realty Bhd v See Hua News Holding Sdn Bhd & Ors

HIGH COURT (KUCHING) — ORIGINATING PETITION NO 26–02 OF 2003 (II)

B HAMID SULTAN JC

25 SEPTEMBER 2007

Companies and Corporations — Winding up — Petition — Petition under s 181 —

C *Allegations of oppressive conduct by petitioner against second to fifth respondents — Whether substantiated — Whether petition to be granted — Companies Act 1965 s 181*

Companies and Corporations — Winding up — Petition — Petition under s 181 —

D *Whether petition too prolix and ought to be struck out*

Companies and Corporations — Winding up — Petition — Petition under s 181 — Whether court may interfere with internal management of companies — Whether there is alternative remedy in law

E

By an agreement dated 30 June 2000 between the petitioner and the second respondent, the petitioner contended it was agreed that the petitioner would transfer all the assets, resources and subsidiary companies into a joint venture company, the first respondent, for 20 million shares in the first respondent. The second respondent

F was to inject RM30m as capital to be utilized as set out in the agreement and in turn be issued 30 million shares. The petitioner filed a petition pursuant to s 181 of the Companies Act 1965, complaining that the agreement had been breached. The petitioner sought, inter alia, that their shares be bought over or, alternatively, the company be wound up.

G

Held, dismissing the petition:

(1) A petition under s 181 of the Companies Act 1965 ought to demonstrate two concurrent matters; first, that the pursuer of the right under that section has filed it in his capacity as shareholder; and second that the petition demonstrates by credible evidence that the shareholder has been, or is continuing to be 'oppressed' or has suffered or continues to suffer 'undue prejudice' as defined in the relevant cases. A petition of this nature must set out every act of oppression or instance of undue prejudice (see para 6(a)).

I

(2) The Companies Act 1965 has not defined oppression and, in consequence, it is left to the courts to decide on the facts of each case whether there exists such oppression as calls for action under this section. The conduct must be burdensome, harsh and wrongful. Unwise, inefficient or careless conduct of director or directors will not pass this test (see para 6(a)).

(3) Where a petition is nothing more than a jangled mass of complaints all lumped together over which the court is unable to make any finding at all, of either oppression or undue prejudice, because the petition is nothing more than an exercise in prolixity, then it must fail. It has long been held that where the cause papers are so framed as be too prolix, where they disclose immaterial facts, and set out at great length documents which could not be material to the issues at hand, such as to as embarrass the opposite party, such pleadings are liable to be, and have, on occasions, been struck out (see para 7).

(4) The court has no jurisdiction to interfere with the internal management of companies so long as they are otherwise being managed in accordance with the law. Further, the court will not concern itself with the rationality of a business decision taken by the directors unless there is fraud. It is also an established principle that the relief under s 181 is only available to an applicant who has suffered harm in his capacity as a member of the company and it would be denied to him where he has acquiesced to the conduct complained of (see para 8(b)).

(5) The terms 'oppressive', 'unfairly discriminatory or unfairly prejudicial' were not to be regarded as three distinct alternatives which are to be considered separately in watertight compartments. They were to be read together. The question of the fairness or otherwise of the company's financial management had to be examined against the background of the company and reasonable expectations of its members and not simply from the applicant's point of view. This involved the balancing of the conflicting interests of the different groups within the company to see if there was a 'visible departure from the standards of fair dealing' (see para 8(b)); *Re HW Thomas Ltd* (1984) 2 ACLC 610 referred.

(6) The allegations are in the nature of breach of points of agreement for which if it is true that there is ample remedy in law as of right and the relevant parties can be liable to damages which will sufficiently compensate the petitioner. The petitioner filing this petition to complain of breach of points of agreement is an abuse of process of court. Each and every allegation taken individually or collectively does not per se warrant the intervention of the court in this petition as there are alternative remedies which the law gives as of right if the allegations are true and, in consequence, the discretion of court ought not to have been invoked by the petitioner (see para 8(d)).

(7) The court was not dealing with a company but an institution and that makes it more difficult for the court to exercise its discretion under s 181 of the Companies Act 1965. For the rights are no more individual and any adverse decision of the court may affect a large number of group including the public. Section 181 relief was not meant to deal with institutions. Disagreement in institutions such as this must be settled by agreement to arbitrate to show some element of civility in this time and era, rather than relying on bare statutes to assert rights when such rights and interest are partly engrossed by a larger number of people, including the employees and the public (see para 9).

[Bahasa Malaysia summary

Melalui satu perjanjian bertarikh 30 Jun 2000 antara pempetisyen dan responden kedua, pempetisyen menegaskan ia telah dipersetujui bahawa pempetisyen akan memindah semua aset-aset, sumber dan anak syarikat ke dalam syarikat usahasama, responden pertama untuk 20 juta saham dalam responden pertama. Responden kedua hendaklah memasukkan RM30j sebagai modal untuk digunakan seperti ditetapkan dalam perjanjian dan sebagai balasan diberikan 30 juta saham. Pempetisyen telah memfailkan satu petisyen menurut s 181 Akta Syarikat 1965, mengadu bahawa perjanjian tersebut telah dilanggar. Pempetisyen memohon, antara lain, agar saham mereka di beli semula atau, secara alternatifnya, syarikat digulung.

Diputuskan, menolak petisyen tersebut:

(1) Suatu petisyen di bawah s 1818 Akta Kontrak 1965 patut menggambarkan dua perkara yang selaras; pertama, yang mana seseorang yang mempunyai hak di bawah seksyen tersebut telah memfailkannya dalam kapasitinya sebagai pemegang saham; dan kedua di mana petisyen yang berdasarkan keterangan yang boleh dipercayai menunjukkan bahawa pemegang saham telah, atau sedang 'ditindas' atau mengalami 'prejudis yang tidak berpatutan' seperti ditafsirkan dalam kes-kes yang berkaitan. Suatu petisyen jenis ini hendaklah menyatakan setiap tindakan yang menindas atau keadaan prejudis yang tidak berpatutan tersebut (lihat perenggan 6(a)).

(2) Akta Syarikat 1965 tidak mentafsirkan penindasan dan, akibatnya, terpulang kepada mahkamah untuk membuat keputusan berdasarkan fakta setiap kes sama ada terdapat penindasan yang perlu diambil tindakan di bawah seksyen ini. Perbuatan itu hendaklah membebankan, kasar dan salah. Perbuatan yang tidak bijak, tidak efisyen atau tidak berhati-hati pengarah atau pengarah-pengarah tidak termasuk dalam ujian ini (lihat perenggan 6(a)).

(3) Di mana suatu petisyen itu tidak lebih daripada pelbagai aduan yang dikumpul sekali yang mana mahkamah tidak dapat membuat apa-apa penemuan langsung, sama ada tentang penindasan atau prejudis yang tidak berpatutan, kerana petisyen itu tidak lebih daripada satu persoalan yang diperpanjangkan, maka ia harus gagal. Ia telah diputuskan bahawa jika kertas-kertas kausa yang dibentuk terlalu panjang, di mana tiada fakta penting, dan dinyatakan dalam dokumen yang panjang lebar tidak mungkin penting kepada isu-isu yang dipersoalkan, seperti memalukan pihak penentang, pliding sebegini boleh dan telah dalam beberapa keadaan dibatalkan (lihat perenggan 7).

(4) Mahkamah tiada bidang kuasa untuk campur tangan dengan pengurusan dalaman syarikat selagi ia dikendalikan menurut undang-undang. Bahkan, mahkamah tidak campur tangan dengan kerasionalan keputusan perniagaan yang diambil oleh pengarah-pengarah kecuali terdapat fraud. Adalah suatu prinsip yang ditetapkan bahawa relief di bawah s 181 hanya untuk pemohon yang terjejas kapasitinya sebagai ahli syarikat dan ia dinafikan terhadapnya jika beliau bersetuju dengan perbuatan yang diadukan itu (lihat perenggan 8(b)).

(5) Istilah-istilah 'oppressive', 'unfairly discriminatory or unfairly prejudicial' tidak boleh dianggap sebagai tidak alternatif berbeza yang harus dipertimbangkan secara berasingan. Ia harus dibaca bersama. Persoalan tentang keadilan pengurusan kewangan syarikat atau sebaliknya harus disiasat dengan latar belakang syarikat dan jangkaan munasabah terhadap ahli-ahlinya dan bukan sekadar daripada pendapat pemohon. Ini melibatkan imbangan kepentingan yang bertentangan kumpulan berbeza dalam syarikat untuk melihat jika terdapat 'visible departure from the standards of fair dealing' (lihat perenggan 8(b)); *Re HW Thomas Ltd* (1984) 2 ACLC 610 dirujuk.

(6) Pengataan tersebut melanggar poin-poin perjanjian di mana jika ia benar terdapat remedi undang-undang yang memadai yang selayaknya dan pihak-pihak relevan boleh bertanggungjawab terhadap kerugian yang boleh diberikan pempetisyen pampasan yang mencukupi. Pempetisyen yang memfailkan petisyen ini untuk mengadu tentang pelanggaran poin-poin perjanjian adalah satu penyalahgunaan proses mahkamah. Setiap dan semua pengataan diambil secara berasingan atau kolektif tidak secara per se mewajarnya campur tangan mahkamah dalam petisyen ini kerana terdapat remedi alternatif yang diberikan oleh undang-undang selayaknya jika pengataan tersebut adalah benar dan, berikutan itu, budi bicara mahkamah tidak patut digunakan oleh pempetisyen (lihat perenggan 8(d))

(7) Mahkamah tidak berurusan dengan sebuah syarikat tetapi sebuah institusi dan ini lebih sukar untuk mahkamah menggunakan budi bicaranya di bawah s 1818 Akta Syarikat 1965. Ini kerana hak-hak tersebut bukan lagi berasingan dan apa-apa keputusan yang bertentangan boleh menjejaskan sebilangan besar kumpulan termasuk orang awam. Relif s 181 bukan untuk membincangkan tentang institusi. Rasa tidak bersetuju dengan institusi sebegini harus diselesaikan dengan persetujuan untuk merujuk penimbangtara untuk menunjukkan elemen ketertiban dalam masa dan era ini, dan tidak bergantung kepada statut semata-mata untuk menegaskan hak-hak jika hak-hak dan kepentingan tersebut melibatkan sebilangan besar orang, termasuklah pekerja-pekerja dan orang awam (lihat perenggan 9).]

Notes

For cases on winding up of petition, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1321–1456.

Cases referred to

A Company, Re [1983] 2 All ER 36 (refd)
Cashin v Cradock 3 Ch D 376 (refd)
Dato' Toh Kian Chuan v Swee Construction and Transport Co (Malaya) Sdn Bhd [1996] 1 MLJ 730 (refd)
Davy v Garret ([1877) 7 Ch D 473 (refd)
Guidezone Ltd, Re (2000) 2 BCLC 321 (refd)
Heng Yea Lee & Anor v Cheah Cheng Lan [2007] 3 MLJ 393 (refd)
HW Thomas Ltd, Re (1984) 2 ACLC 610 (refd)
Jermny Street Turkish Baths Ltd [1971] 3 All ER 184 (refd)
Kong Thai Sawmill (Miri) Sdn Bhd, Re [1978] 2 MLJ 227 (refd)

Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789 (refd)
Sanford v Sanford Courier Service Pty Ltd & Ors (1986) 10 ACLR 549 (refd)
Senson Auto Supplies Sdn Bhd [1988] 1 MLJ 326 (refd)
Tong Eng Sdn Bhd, Re (Loh Leng Keng, petitioner) [1994] 1 MLJ 451 (refd)
Tri-Circle Investments Pte Ltd, Re [1993] 2 SLR 523 (refd)
Watson v Rodell 3 Ch D 380 (refd)

Legislation referred to
Companies Act 1965 ss 181, 218

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Mekanda Singh Sandhu (Sandhu & Co Advocates) for the respondents.
Alvin Chong (Alvin Chong & Partners Advocates) for the provisional liquidators/first respondent.

Hamid Sultan JC (delivering judgment in open court):

[1] This is my judgment in respect of the petitioner's petition, encl 3 made pursuant to s 181 of the Companies Act 1965 ('CA 1965') and the second, fourth and fifth respondents' application, encl 150, to expunge some parts of the affidavit of the petitioner, pursuant to O 41 r 6 and/or O 18 r 19 of the Rules of the High Court 1980 ('the RHC') and inherent jurisdiction of the court. The third respondent has passed away and this is opposed by second, fourth and fifth respondents. In crux, the petitioners are seeking two main reliefs; namely that their shares be bought over or alternatively the company be wound up. The petitioners say by a points of agreement ('POA') dated 30 June 2000 entered into between the petitioner and the second respondent, it was agreed that the petitioner would transfer all the assets, resources and subsidiary companies into a joint venture company, namely the first respondent for 20 million shares therein and on the part of the second respondent, they were to inject cash of RM30m as capital to be utilized as set out in the POA and in turn be issued 30 million shares. It was agreed that the equity would be maintained at 40:60 for the parties for shares and board representation in the first respondent as well as the subsidiary companies. The main complaint is that this POA has been breached.

[2] The petition, affidavits, exhibits filed in this action runs to more than 5,980 pages. There is winding-up petition No CWU-28–03–2004-III(I) filed by the second respondent after commencement of this action to wind up See Hua News Holding Sdn Bhd under s 218 of CA 1965 which I have read along with the submission simultaneously. All parties have agreed that the parties can refer to the affidavits and documents from the other petition for the determination of both petitions. I have also, on the date of the hearing of the petition, informed the parties that I will deal with encls 3 and 150 in one judgment. For purpose of dealing with encl 150, it is necessary and essential for me to go through encl 3 and the relevant affidavits filed therein. In consequence, after having read encls 3 and 150 and the relevant affidavits

in detail, I take the view that it will be prudent for me to deal with encl 150 at the end of my judgment. A

Brief facts

[3] The petitioner's version can be summarised as follows: (a) the petitioner, under the helm of Datuk Lau Hui Siong had over a period of some 50 years built up a group of 18 companies (for brevity the SHR Group), with the petitioner as the holding company. Of these, eight were publishing and printing companies holding eight publishing licenses, six printing licenses with a combined daily circulation of 180,000, as well as 5 printing plants, a paper manufacturing plant and other related companies. In particular: (i) See Hua Daily News under See Hua Daily News Sdn Bhd; (ii) The Borneo Post under Borneo Post Sdn. Bhd; (iii) Utusan Borneo under Harian Borneo Sdn. Bhd. (iv) See Hua Daily News (Sabah Edition) under See Hua Daily News (Sabah) Sdn. Bhd. (v) Borneo Post (Sabah Edition) under Borneo Post (Sabah) Sdn. Bhd. (vi) See Hua Weekly, also under See Hua Daily News Berhad. As at the year 2000, the See Hua Daily News, The Borneo Post and Utusan Borneo, were respectively the largest Chinese, English and Bahasa Malaysia language newspapers in circulation in placeEast Malaysia. The KTS Group of companies was built up by the third respondent and is involved mainly with the timber industries. The fifth respondent is in turn the holding company of a group of companies known as the KTS Group. The management of the KTS Group is controlled by the third respondent and fourth respondent. The third respondent now deceased, was the chairman and executive chairman of the second and fifth respondents. The fourth respondent is the son of the third respondent and the managing director of the second and fifth respondents. As such, it is alleged that the fourth respondent was and is at all material time in control of the KTS Group, in particular the second and through it the first respondent. The fourth respondent was the chief executive officer of the first respondent. The third respondent was the brother of Datuk Lau Hui Siong. (b) The salient terms of the points of POA are: (i) a new company was to be formed as the joint venture vehicle, namely the first respondent; (ii) information on the various assets to be transferred by the petitioner to the first respondent was provided beforehand by the petitioner to the KTS Group who then verified and collated and accumulated them into various files — 'Representation Files', which then form part of the POA; (iii) SHR Group was to transfer all their assets and their shares held in subsidiaries, agreed at a value of RM20m, into the first respondent and to be issued 20 million shares in return upon such transfer. (iv) KTS Group through the second respondent was to subscribe 30 million shares in the first respondent by immediately injecting capital of RM30m in cash; (v) the shareholding of the first respondent was therefore to be in the ratio of 40:60 which was also to apply to representation in the board of directors of the first respondent and its subsidiary companies; (vi) the parties were to immediately cause the capital injected by the second respondent for the following: (a) restructuring of the group's financial position (b) to secure the release of all SHR guarantees, both personal or corporate, in connection with all debts owed by the subsidiary companies to various financial institutions; and (c) and for operational purposes also. The 20 million shares in the first respondent were to be issued to the petitioner upon the transfer of the assets, irrespective of whether the KTS Group 'has been issued with their 60% shares in first

B C D E F G H I

respondent. After the POA, the second respondent was to verify that the assets verified/identified/confirmed by them in the verification exercise before the POA and listed in the representation files were transferred by the petitioner. If there is any shortfall in the assets transferred by the petitioner, as at the date of completion of the verification exercise or at the point of a subsequent audit, the petitioner was to indemnify the second respondent. The parties were to jointly cause the first respondent to use its best endeavour to collect debts and only after such effort made, if there were uncollected debts after a period of 12 months, would it be considered bad debts, whereupon the second respondent would have a right of indemnity against the petitioner. Apart from the clear provisions of the POA, the petitioner asserts they have legitimate expectations to participate in the management of the first respondent and its subsidiaries and relies on the case of *Re Guidezone Ltd* (2000) 2 BCLC 321.

RESPONDENTS' VERSION

[4] The respondents' version can be summarised as follows: The first respondent is a vehicle for a joint business venture in which the second respondent owns 60% of the issued shares and the petitioner owns the other 40%. The company was set up pursuant to POA entered into on 6 November 2000 as a vehicle for the rescue of the See Hua Newspaper Business and related businesses ('the See Hua Group') from financial collapse. As at 30 September 2000, the See Hua Group were insolvent and on the verge of financial collapse, having accumulated losses of RM35.5m and total liabilities of RM54.6m. This is evidenced by the petitioner's board of directors' resolution requesting an immediate injection of RM2m when it approved the joint business venture with the second respondent, the late Datuk Lau Hui Siong's ('LHS') personal advance of RM11m to the See Hua Group, the abortive attempt by the petitioner to raise about RM12m by issuing shares at a discount to its own shareholders without prior court approval, loans of RM1.5m and RM200,000 taken by LHS from Katas Credit Leasing Bhd and his brother the late Dato Sri Lau Hui Kang which were on-lent to the See Hua Group to keep it going. LHS had advanced RM11m to the See Hua Group. He and his family owned 30% of the Group through the petitioner and were liable under personal guarantees for the Group's bank credit facilities. Thus in 2000, LHS and his family had a strong personal motivation to avert the financial collapse of the See Hua Group and negotiations were entered into with the fourth respondent for a rescue. These negotiations resulted in the POA dated 6 November 2000 and the setting up of the company as a vehicle for the rescue of the See Hua Group. That was in year 2000. By November 2003 when the petitioner filed this petition at the behest of LHS and his children, LHS's motivation had changed. In the intervening three years, he had recovered RM10m out of the RM11m he advanced to the See Hua Group and most of the personal guarantees given by him and his family for the See Hua Group banking facilities had been discharged. However, the huge losses the See Hua Group suffered under the petitioner since 1990 continued after the POA. The See Hua Group was kept afloat by continuous cash injections from the second respondent. Despite the financial insolvency of the company, LHS and his children wanted to force a buy-out by the respondents so that he could exit from the company at a profit. Hence, the filing of this petition praying for a buyout order based upon false allegations of oppression.

[5] The petitioner's complaint can inter alia be summarised as follows: **A**

(a) upon taking over the first respondent, the second respondent to fifth respondents were able to exert virtually total control over the first respondent and its subsidiaries by virtue of being the majority shareholder by controlling the board of directors the fourth respondent was appointed CEO; the accounts by controlling all the funds and the incomes; the recording of the minutes of meeting; and by denying the petitioner access to corporate documents and information and any right to participate in the management of the first respondent and its subsidiaries. **B**

(b) having assumed control of the first respondent and its subsidiaries, the second and/or third and/or fourth and/or fifth respondents then set about to exclude and sidelined the petitioner by various means herein after described with a view to facilitate the second and/or third and/or fourth and/or fifth respondents diverting the assets, resources and businesses of the first respondent. **C**

(c) once the second to fourth respondents took control of the first respondent and its subsidiaries, they began a concerted effort to divert the assets, resources and businesses of the first respondent and its subsidiaries. **D**

(d) the setting up of Oriental Daily News ('ODN'), a rival newspaper using the assets, resources and funds of the first respondent and its subsidiary; (iii) they did so without the prior knowledge, consent or approval of the board of director and shareholders of first respondent. (iv) the respondents owned Penerbitan Cerdas Maju Sdn Bhd who is the publisher of ODN; (v) in publishing the inaugural issue of the ODN of 29 September 2002, the respondents have stolen the entire news section of See Hua Daily News, the newspaper owned exclusively by the first respondent; (vi) the result was that the See Hua Daily News of 29 September 2002 was reduced to a mere 6 sheets when its normal run was 13 sheets. The second to fourth respondents were using the first respondent assets, resources and funds for their own profit and excluding the petitioner there-from. The respondents were pursuing a course of conduct designed by them to advance their own interests to the detriment of the petitioner and the petitioner relies on the case of *Re Bright Pine Mills Pty Ltd* (1969) VR 1002 and says that the Australian court in considering the equivalent section of our s 181 found that when it 'appeared that he was allowing an asset of the company to be used for his profit and not for the profit of the company, so as to exclude the shareholder from benefit thereof' it was oppression. Further, the petitioner relies on the case of *Re SG White Pty Ltd* [1982] 1 ACLC 254 and says that in that case, the complaint had been that the person in control of the company had 'contrived to impugned share allotments of the petitioner to gain for himself "76% shareholding and thus destroy the partnership structure of the company', to deprive the petitioner of dividends … and generally to conduct the company's affairs solely for the purposed and benefit for himself and his family.' **E** **F** **G** **H** **I**

(e) the asset and resources of the first respondent was abused. The second to fourth respondents had caused the first respondent and its subsidiaries to enter into fresh contracts with or to otherwise engage members of the KTS Group for the provision of various services at a higher cost, thereby bringing benefits to the

KTS Group while increasing the financial burden of the first respondent and its subsidiaries. All of these were done without the prior knowledge, approval and consent of the board of directors and shareholders of first respondent and its subsidiaries, in contravention of s 131 of the CA 1965.

(f) the first respondent's operations was shifted into KTS owned premises. The publication software, sales/marketing and administrative operations of the first respondent's subsidiaries had been housed in premises belonging to the first respondent and its subsidiaries at a rent which was below market rate. The second to fourth respondents then moved or transferred these operations throughout 2001 and 2002 to premises belonging to members of the KTS Group in Kuching, Sibu, Kota Kinabalu, Miri, and Bintulu at a higher rent. This has resulted in moving and setting up costs being incurred unnecessarily by the subsidiaries concerned, while at the same time the aforesaid premises have been left under-utilised or vacant, thereby bringing benefit to the KTS Group at the expense and loss of the first respondent and its subsidiaries and the petitioner the minority shareholder therein.

(g) the products of See Hua Paper Mill Sdn Bhd ('SHPM'), which were previously sold directly at wholesale prices to its customers, are now being sold through Hamiko Rimba Sdn Bhd, an associated company of the fifth respondent.

(h) The leasing of equipment and machinery is now being made through Katas Credit Leasing Sdn Bhd (Katas Leasing) an associated company of the fifth respondent.

(i) the purchase of printing machinery which were previously made directly from relevant suppliers, are now made through KTS Trading Sdn Bhd as an intermediary, thereby bringing benefits to a KTS company at the expense of the petitioner.

(j) the second to fifth respondents had caused the first respondent to purchase assets of substantial value in 2002. These purchases have been done by the second to fifth respondents without the prior knowledge, approval and consent of the board of directors and shareholders of first respondent.

(k) purported loan and investment in SHPM.

(l) denial of access to information and exclusion from management of the first respondent and its subsidiaries. Under the terms of the POA, the petitioner was entitled to board and shareholding representation in the first respondent and its subsidiaries transferred to the first respondent. It was further contemplated that the petitioner would play a role in the management of the first respondent and its said subsidiaries.

(m) setting up of new companies. Although the first respondent is now listed as the sole shareholder of See Hua Marketing Sdn Bhd, SHNH Resources Sdn Bhd, See Hua Marketing (placeSabah) Sdn Bhd, SHNH Resources Sdn Bhd and See Hua Rental Sdn Bhd., the third and fourth respondents are listed as directors of the same. To date, none of the petitioner's representatives are members of the board of directors of the aforesaid companies, and the petitioner is unable to participate in the management of the new companies in the first respondent in any way.

(n) Misuse of the new companies incorporated by the respondents. In 2001 when the third and fourth respondents set up these companies, they set themselves up as the sole shareholders thereof. At the same time, they channelled all the revenue of the publishing subsidiaries of the first respondent into these new companies. This meant that all the revenues from the publishing subsidiaries of the first respondent went solely to the third respondent and fourth respondent. The petitioner asserts that this is clearly a flagrant disregard of the rights and interests of the petitioner, and a very serious act of oppression and the petitioner relies on the cases of *Heng Yea Lee & Anor v Cheah Cheng Lan* [2007] 3 MLJ 393; *Re Bright Pine Mill Pty Ltd* and *Sanford v Sanford Courier Service Pty Ltd & Ors* (1986) 10 ACLR 549.

(o) Denial of participation management and access to corporate information. Access to and copies of the resolutions and minutes of board of directors and shareholders meetings of the first respondent and the subsidiaries transferred by the petitioner to the first respondent under the terms of the POA, as well as the accounting records of the same; and particulars of the new companies.

(p) Sidelining the petitioner. To facilitate their diverting of the assets, resources and funds of the first respondent's and its subsidiaries, the second to fourth respondents sidelined the petitioner by: (i)the addition of the fifth respondent as a shareholder of the first respondent without the petitioner's consent; and (ii) the reduction of the composition of the first respondent's board of directors from 10 to 5, without the petitioner's consent.

(q) addition of the fifth respondent as shareholder. At the board of directors' meeting of the first respondent on 14 June 2002, both the third respondent and the fourth respondent passed a resolution to add the fifth respondent as a shareholder of the first respondent, despite the objections of Datuk Lau Hui Siong on behalf of the petitioner.

(r) reduction in the composition of the board of directors from 10 to 5, and proceedings at the annual general meeting of 28–06–2002. Under the terms of the POA, the petitioner was to hold 40% of the shares in the first respondent, with the proportionate representation on the board of directors of the same.

(s) Refusal to issue shares and alleged shortfall. At the same time as all of the above were happening, contrary to the terms of the POA, the respondents refused to issue the 20 million shares due to the petitioner even though the petitioner had transferred all their assets, resources and companies into the first respondent as required by the POA.

(t) Putting pressure on the petitioner through its directors and officers and selective release of guarantors. Refusing to settle trade creditors of Grandeur and Ambassador Restaurants and other trade creditors. Threatening to 'seize' the shares of the petitioner. Devising 'The Scheme' to force Datuk Lau Hui Siong and wife to admit in writing to the alleged shortfall. Additional acts of oppression.

(u) Failure to inject RM30m and at the same time that all of the above was being carried on and carried out by the second to fifth respondents, the petitioner is convinced from the accounts that second respondent had in fact not injected the RM30m capital they were required to under the POA.

(v) Continuous oppression after the filing of s 181 petition.

(w) Filing of s 218 petition was to impede the s 181 petition and some six months after the presentation of the s 218 petition, the second respondent had caused the provisional liquidator to sell all the subsidiaries of the first respondent to them for a mere sum of RM6.5m. The second to fifth respondents successfully stripped the first respondent of every tangible asset of value leaving the first respondent as nothing more then an empty shell. In effect, leaving the petitioner with shares in a company that has been cleaned out of all assets of value and only with huge liabilities instead.

[6] I have read the petition in full and find that it consists of 72 pages, excluding the annexure itself. I take the view that the petition itself ought to have been dismissed for prolixity. My reasons are as follows:

(a) In my view a petition under s 181 of CA 1965 ought to demonstrate two concurrent matters; first, that the pursuer of the right under that section has filed it in his capacity as shareholder; and second that the petition demonstrates by credible evidence that the shareholder has been, or is continuing to be 'oppressed' or has suffered or continues to suffer 'undue prejudice' as defined in the relevant cases. A petition of this nature must set out every act of oppression or instance of undue prejudice. Only if this requirement is satisfied, the court will be in a position to run its eyes along each of the allegations, compare that with the evidence; and then rely on the submission of the parties. The CA 1965 has not defined oppression and, in consequence, it is left to the courts to decide on the facts of each case whether there exists such oppression as calls for action under this section. The conduct must be burdensome, harsh and wrongful (see *Jermny Street Turkish Baths Ltd* [1971] 3 All ER 184). Unwise, inefficient or careless conduct of director or directors in my view will not pass this test. The learned authors of Datta on *The Company Law* (4th Ed) at p 809 set out the acts the court held as oppressive and those which were not held as oppressive. It reads as follows:

> It must go beyond what is required to make out a case for a winding up order and must indicate some lack of probity or fair dealing towards one or more members of the company (*Fildes Bros Ltd* [1970] 1 All ER 923). This section covers oppression by anyone who is taking part in the conduct of the affairs of the company whether de facto or de jure (*HR Harmer Ltd, Re* [1959] 1 WLR 62; [1958] 3 All ER 689). It is not essential that the alleged oppressor is oppressing in order to obtain a financial benefit; conduct may be oppressive even if it is simply due to overwhelming desire for power and control (KRS *Narayana Iyengar v T* A Mani, A 1960 Mad 338; *HR Harmer*). An act of omission might amount to oppressive conduct if it is shown that it was designed to achieve some unfair advantage (*Five Minutes Car Wash Services Ltd* [1966] 1 WLR 745). Where after the life insurance business of a company was nationalised the majority wanted to use the assets in some other business, it was held that this amounted to oppression on the minority (*Hindusthan Co-operative Insurance Society Ltd* 65 CWN 68). It is an oppression to pass a resolution prejudicing the interest of the company or its shareholders generally (*AM Varkey v JR Motishaw* A 1964 Ker 114). Unreasonable conduct of directors of a private company in refusing, owing to private disputes, to register transfer of some shares while transferring some other shares bequeathed under a will, involves the violation of the conditions fairplay and amounts to

oppression (*Mrs Gajarabai v Patny Transport P Ltd* (1965) 2 Comp. LJ 234). Overthrow of the majority by physical force though a single act, its effect is likely to persist indefinitely and amounts to oppression of the majority by a minority and an order should be made under this section (*Ramashankar Prasad v Sindri Iron Foundry Pvt Ltd*, A 1966 Cal 512).

Acts held not oppressive — Allegations of unwise, inefficient and careless conduct against a director in the performance of his duties cannot in themselves give rise to any claim for relief under this section and a petition limited to such allegations will be dismissed in limine. Acts of misappropriation and mismanagement or improper payment of dividend in the past cannot support an application under this section: they must be continuing up to the time of presentation of application (*Stadmed Private Ltd v Kshetra Mohan Saha,* 72 CWN 601, 616). Denial of right of inspection or other right of a shareholder or failure to comply with formalities required in the matter of giving notice of general meeting or refusal to declare more than moderate rate of dividend even though the profits earned could justify a higher rate of dividend may not, taken by themselves, amount to oppression *(Maharani Lalita Rajya Lakshmi v Indian Motor Co*, A 1962 Cal 127). Mere illegal or irregular acts, unless they are oppressive or prejudicial to the interests of the company or to public interest, cannot support a petition (*Seth Mohanlal Ganpatram v Shri Sayaji Jubilee Cotton and Jute Mills Co Ltd*., 34 Comp. Cas 777).

[7] The petition in this case is drafted in a manner that runs to 72 pages. This petition is, as if an entire set of complaints, whether or not they fall within the purview of s 181, have all been hurled into the court with the duty foisted on the court to pick and choose to allow the petition. The court is not a filter of debris (see *Watson v Rodell* 3 Ch D 380). Where a petition is nothing more than a jangled mass of complaints all lumped together over which the court is unable to make any finding at all, of either oppression or undue prejudice, because the petition is nothing more than an exercise in prolixity, then it must fall. It has long been held that where the cause papers are so framed as be too prolix, where they disclose immaterial facts, and set out at great length documents which could not be material to the issues at hand, such as to as embarrass the opposite party (see *Cashin v Cradock* 3 Ch D 376), such pleadings are liable to be, and have, on occasions, been struck out (see *Davy v Garret* (1877) 7 Ch D 473).

[8] Even on merit, I find that the acts complained of do not prima facie amount to oppressive conduct or was unfairly prejudicial to the petitioner taking into consideration that a person who joins the company must accept the fact that he may be outvoted. In crux, the courts do not sit to hear complaints in respect of managerial decisions honestly arrived at (see *Re Tri-Circle Investments Pte Ltd* [1993] 2 SLR 523). In *Re Tong Eng Sdn Bhd (Loh Leng Keng, Petitioner)* [1994] 1 MLJ 451 on the facts of the case, Selventhivanathan JC (as he then was) took the view that it is not the duty of court to assume the role of policeman over the affairs of the respondent company. I have dealt with principles relating to s 181 petition in Kuching High Court OP–26–05–2006- II *Dato' Ting Check Sii v Datuk Haji Mohammad Tufail bin Mahmud & Ors* in my judgment delivered on 26 July 2007 and do not wish to repeat the same here save as to say the following.

(a) In deciding the petition on affidavit evidence, the court is under a duty to confine itself only to those facts which had been admitted or have not been credibly denied and to the probabilities of the case; to test the allegations in the several affidavits against the contemporaneous documentary evidence as well as against all the surrounding circumstances and the probabilities of the case and to have regard to the law generally applicable to petition under s 181 of CA 1965 (see *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789). On the issue of oral evidence relating to the petition, I have dealt with in the case of Kuching High Court CWU–28–32–2006-II *Dato' Ting Check Sii v Datuk Haji Mohammad Tufail bin Mahmud & Anor* in my judgment delivered on 26 July 2007 and the relevant part is reproduced:

> 4. The hearing of the petition commenced by the petitioner giving evidence. I realised during the course of hearing the petition that the respondents were attempting to restate what was in the affidavit. I informed them that s 218 (1) (i) petition is meant to be petition to be tried by affidavits. Only in exceptional cases that too with the permission of court, can the deponent be cross-examined. I have informed the parties that I will give my grounds in my judgment after hearing why oral evidence in principle should not be allowed in hearing a s 218 petition. My reasons are as follows:
>
> (a) In *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 Lord Temple Man sitting on the Privy Council observed:
>
> > The Company's (Winding Up) Rules 1972 provide for winding up petition to be verified by affidavit and for affidavits in opposition and reply to be sworn and filed. This procedure was followed in the present case. In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender. In winding up proceeding the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross-examination of the deponent and that application has been granted and the deponent does not attend. The court cannot give a direction about evidence unless one of the litigants desires such direction to be made. Of course a judge may indicate to a petitioner that unless he calls oral evidence or applies to cross-examine the deponents of the opposition so as to prove a disputed fact, his petition is likely to fail. The judge may equally indicate to a respondent that unless he calls oral evidence or applies to cross-examine the petitioner's deponents for the purpose of disproving an allegation made by the petitioner is likely to succeed. At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts. On behalf of the respondent in the present case it was submitted that the trial judge paid some attention to the petitioner's disputed allegations of an express assurance but the board is satisfied that the judge confined his consideration of the petition to the undisputed facts and rightly concluded that the petitioner had made out his case that it was just and equitable to wind up the company.

((b)) *Tahansan*'s case is not authority for the proposition that oral evidence must be given for purpose of hearing the petition. In fact the law which governs the mode of trial in a winding up petition is set out in s 221(2) of CA 1965 which states as follows:

> (2) The court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition —
>
> (a) direct that any notices be given or any steps taken before or after the hearing of the petition;
>
> (b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the court;
>
> (c) direct that oral evidence be taken on the petition or any matter relating thereto;
>
> (d) direct a speedy hearing or trial of the petition or any issue or matter;
>
> (e) allow the petition to be amended or withdrawn; and
>
> (f) give such directions as to the proceedings as the court thinks fit.

(c) Any party who intends to adduce oral evidence at the trial of the hearing must make an application under s 221 of CA 1965 and the court must direct to do so. Thus, it is not a substantive right to adduce oral evidence.

(d) There is no inflexible rule or practice prohibiting the adducing of oral evidence or the cross-examination of the deponents of affidavits in winding up applications. Where necessity suggests or expediency requires, it is open to the judge trying winding up proceedings, to allow oral evidence. Where the application for calling oral evidence is not only belated but is intended to retard and delay the progress of the winding up application the court must refuse to exercise the discretion to allow oral evidence, as in winding up petition, expedition is absolutely necessary (see *Veeramachineni Seethiah v Bode Venkatasubbiah and Others* AIR (36) 1949 Madras 675].

(e) In *Chappel House Colliery & Co* (1883) 24 ChD 259, it was stated that the court will not as a rule order a petition to stand over for a long period as it would not be just to the company. To expedite the hearing of winding up proceedings is not only in the interest of the company but also an element of public policy in regard to commercial morality to dispose of the petition early (see *Veeramachineni*'s case).

(b) It has been held that the court has no jurisdiction to interfere with the internal management of companies so long as they are otherwise being managed in accordance with the law (see *Re Tri-Circle Investment Pte Ltd*). Further, the court will not concern itself with the rationality of a business decision taken by the directors unless there is fraud. (see *Dato' Toh Kian Chuan v Swee Construction and Transport Co (Malaya) Sdn Bhd* [1996] 1 MLJ 730]. It is also an established principle that the relief under s 181 is only available to an applicant who has suffered harm in his capacity as a member of the company (see *Re A Company* [1983] 2 All ER 36) and it would be denied to him where he has acquiesced to the conduct complained of (see *Senson Auto Supplies Sdn*

Bhd [1988] 1 MLJ 326). In *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227, the Privy Council explained that for section 181 CA 1965 to be applicable, the petitioner must prove 'oppression' or disregard, that is to say: (i) there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play; or (ii) an awareness of the interest and a conscious decision to override it or brush aside that interest. In *Re HW Thomas Ltd* (1984) 2 ACLC 610, the New Zealand Court of Appeal held that the terms 'oppressive', 'unfairly discriminatory or unfairly prejudicial' were not to be regarded as three distinct alternatives which are to be considered separately in watertight compartments. They were to be read together. The court further held that question of the fairness or otherwise of the company's financial management had to be examined against the background of the company and reasonable expectations of its members and not simply from the applicant's point of view. This involved the balancing of the conflicting interests of the different groups within the company to see if there was a 'visible departure from the standards of fair dealing'.

(c) It is the petitioner's duty to plead the oppressive conduct or conduct in disregard of interests or unfairly discriminatory or prejudicial conduct in the body of the petition and to provide the necessary particulars in support of such conduct ((see Loh Siew Cheang's *Corporate Powers Accountability* (2nd Ed.)). In deciding the petition, the correct approach to follow is to ascertain the allegations of oppressive conduct relied upon by the petitioner from the body of the petition and not from affidavit evidence (see *Re Tecnion Investments Ltd* (1985) BCLC 434).

(d) It is my finding that:

(i) the petitioner has not made out a case of oppression.

(ii) the allegations are in the nature of breach of POA for which if it is true that there is ample remedy in law as of right and the relevant parties can be liable to damages which will sufficiently compensate the petitioner. The petitioner filing this petition to complain of breach of POA is an abuse of process of court.

(iii) each and every allegation taken individually or collectively does not per se warrant the intervention of the court in this petition as there are alternative remedies which the law gives as of right if the allegations are true and, in consequence, the discretion of court ought not to have been invoked by the petitioner.

[9] En passant, I will say that the petition and affidavits herein setting out the shareholders, their rights, interest and expectations as a whole was sufficiently complex and I have spent a number of days to write this judgment. What I realise at the end of the day was that I was not dealing with a company but an institution and that makes it more difficult for the court to exercise its discretion under s 181 CA 1965. For the rights are no more individual and any adverse decision of the court may affect a large number of group including the public. Section 181 relief in my view was not meant to deal with institutions. Disagreement in institutions such as this must be settled by agreement to arbitrate to show some element of civility in this

time and era, rather than relying on bare statutes to assert rights when such rights and interest are partly engrossed by a larger number of people, including the employees and the public. Further, a survey of cases under s 181 or s 218 (1)(i) of CA 1965 will show that petitioners often had minimum success and almost in all case it was a futile exercise for the petitioner. However, this area of law has been a fertile ground for litigators but the end result is often great loss to the petitioner as well as the respondent, no matter who wins. I trust the parties will keep this in mind and attempt to settle disagreement through a mediatory process in the interest of the institution as a whole.

[10] For reasons stated above, I take the view that the petition must be dismissed with costs. The getting up fees shall not exceed RM100,000. If costs cannot be agreed, the respondents are at liberty to tax the costs.

[11] In respect of encl 150, I take the view that the petitioners are only expressing their complaint in a crude form and such manner ought to have been avoided by the solicitors preparing the affidavit. As I have dismissed the petition, I find that it is not necessary for me to deliberate on encl 150. I take the view that encl 150 must be dismissed. However, the costs of the application must be borne by the petitioner. The getting up fees for the application shall not exceed RM5,000. If costs cannot be agreed, the second, fourth and fifth respondents are entitled to tax their costs. I hereby order so.

Petition dismissed.

Reported by Brendan Navin Siva